IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 16, 2001

STATE OF TENNESSEE v. GREGORY FLITTNER

Appeal as of Right from the Circuit Court for Williamson County
No. II-126-698 Timothy L. Easter, Judge

No. M2000-02367-CCA-R3-CD - Filed December 14, 2001

The appellant, Gregory Flittner, was convicted by a jury in the Williamson County Circuit Court of driving under the influence with a blood alcohol level of .10% or more. The trial court sentenced the appellant to serve eleven months and twenty-nine days in the Williamson County Jail and further ordered that all but seven days of the appellant's sentence be suspended. On appeal, the appellant raises the following issues for our review: (1) whether his blood alcohol test was taken voluntarily; (2) whether the trial court erred in refusing to charge the jury with driving while impaired (DWI) as a lesser-included offense of driving under the influence (DUI); (3) whether the trial court erred in failing to require the State to turn over "all results of reports and scientific tests . . . in the possession of the State" pursuant to the appellant's motion to compel; (4) whether the trial court's instruction on a blood alcohol content of .10% or more as a presumption of intoxication under Tenn. Code Ann. § 55-10-401(a)(1) (1998) and a blood alcohol content of .10% or more as an element of the offense under Tenn. Code Ann. § 55-10-401(a)(2) was so unclear as to confuse or mislead the jury; and (5) whether the trial court erred in allowing the arresting officer to testify that he had released one hundred and fifty (150) people whom he had previously stopped for DUI. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Lee Ofman, Franklin, Tennessee, for the appellant, Gregory Flittner.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Joseph D. Baugh, District Attorney General; and Lee Dryer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On May 25, 1998, shortly after 10:00 p.m., Officer David Hawtin observed the appellant's vehicle drifting within his lane of traffic, crossing the double yellow line, braking for no apparent reason, and failing to stop at stop signs until his vehicle had entered the intersection. Officer Hawtin suspected that the appellant was tired or intoxicated and signaled for the appellant to stop his vehicle. The appellant continued for approximately two and a half blocks after the officer activated his blue lights. When the appellant finally stopped his vehicle, Officer Hawtin approached the driver's side of the vehicle and instructed the appellant to roll down his window. As the appellant complied with his request, Officer Hawtin detected a strong odor of alcohol. He also noticed that the appellant's clothing was disheveled and the appellant looked sleepy.

In response to Officer Hawtin's question regarding how much alcohol he had been drinking, the appellant initially denied that he had consumed any alcohol. However, after the officer repeated the question, the appellant admitted that he had been drinking with friends. At that point, Officer Hawtin asked the appellant to step out of the vehicle. Officer Hawtin testified that the appellant had difficulty getting out of the vehicle and appeared unsteady on his feet after he stepped outside. After further questioning, the appellant finally conceded that, from 8:00 to 10:00 p.m. that evening, he had consumed three Killian's beers. Officer Hawtin then requested that the appellant take some field sobriety tests in order to determine the extent of the appellant's intoxication. Officer Hawtin also informed the appellant that, if he refused to take a test to determine his blood alcohol content, the appellant's driver's license could be suspended. In response, the appellant evaded the officer's requests and maintained that he did not know if he should take the field sobriety tests. After several unsuccessful attempts to communicate with the appellant regarding the field sobriety tests, Officer Hawtin became convinced that the appellant was too intoxicated to drive and placed him under arrest for DUI. He informed the appellant that he would take the appellant to the jail in order to administer a breath test to determine the appellant's blood alcohol content.

After the appellant had been placed in Officer Hawtin's cruiser, they once again discussed the tests available to determine the appellant's blood alcohol content. Officer Hawtin again explained the implied consent law to the appellant and repeated that if he refused to take any blood alcohol test his driver's license would be suspended for one year. At the conclusion of the conversation, the appellant agreed to submit to a blood test instead of a breath test.

Officer Hawtin drove the appellant to Williamson County Hospital where the appellant's blood was drawn. The blood sample was later submitted to the Tennessee Bureau of Investigation (TBI) laboratory for testing. After the appellant's blood was drawn, Officer Hawtin drove the appellant to the Williamson County Jail. Following his arrival at the jail, the appellant signed an implied consent form confirming that the officer had the appellant's permission to conduct a blood alcohol test. Officer Hawtin explained that he did not have the appellant sign the form prior to testing because, for most of the encounter, he was the sole officer in contact with the appellant in a largely unsecured environment. Until the appellant was taken to the jail where other officers were present, Officer Hawtin did not consider the situation controlled enough to ask the appellant to sign the implied consent form.

The report from the TBI laboratory reflects that, at the time the appellant's blood was drawn, his blood alcohol content was .21%, well over the legal limit. The appellant was indicted for one count of driving under the influence and one count of driving with a blood alcohol content of .10% or more. A jury in the Williamson County Circuit Court acquitted the appellant of DUI as alleged in count one but found him guilty of driving with a blood alcohol content of .10% or more as alleged in count two. After a brief sentencing hearing, the trial court sentenced the appellant to eleven months and twenty-nine days incarceration in the Williamson County Jail, suspending all but seven days of the sentence. The appellant now appeals.[1]

II. Analysis

A. Motion to Suppress

The appellant argues that the trial court erred in failing to suppress the results of the appellant's blood alcohol test, contending that he did not voluntarily submit to the test. The State contends that the appellant "impliedly consented to the blood test by operating a vehicle, expressly consented to the test when asked to submit, and failed to expressly refuse to submit."

Unless the evidence contained in the record preponderates otherwise, the trial court's factual findings on a motion to suppress are conclusive on appeal. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Specifically, the trial court, as the trier of fact, will resolve questions regarding the credibility of the witnesses, the weight and value of the evidence, and conflicts of the evidence. Id. Accordingly, this court will grant the prevailing party "the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Id. Furthermore, this court will conduct a de novo review of the trial court's application of the law to the factual findings. State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).[2]

Initially, we note that the appellant argues that the standard for the admissibility of blood alcohol results that is contained in State v. Jordan, 7 S.W.3d 92, 99 (Tenn. Crim. App. 1999) is controlling in this case. We disagree. Jordan established prerequisites which must be met before compelled blood alcohol tests are admissible in a prosecution for "aggravated assault or homicide by the use of a motor vehicle," regardless of the individual's refusal. See Tenn. Code Ann. § 55-10-406(e) (2000 Supp.). However, in all other cases involving blood alcohol tests, if consent is refused the test is inadmissible. See Tenn. Code Ann. § 55-10-406(a)(3). Because the instant case involves the admission of blood alcohol test results in a prosecution for DUI, the Jordan standard is inapplicable.

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[1] We have chosen to address the appellant's issues in an order different from that presented by the appellant.

[2] In the trial court's order denying the appellant's motion to suppress the results of the blood alcohol test, the trial court simply found that "[f]ailure of the officer to admonish the defendant of the consequences of refusing a chemical test 'prior to the test' does not render the blood alcohol test results inadmissible." Notably, the trial court made no findings regarding the appellant's consent to the test.

Instead, we begin by noting that "[a]ny person who drives any motor vehicle in the state is deemed to have given consent to a test for the purpose of determining the alcoholic or drug content of that person's blood. . . ." Tenn. Code Ann. § 55-10-406(a)(1). In applying this statute, this court has previously remarked, "our legislature has declared that consent of all motorists is implied; therefore, it is unnecessary for law enforcement officers to obtain the voluntary consent of an individual motorist before administering a breath test for alcohol concentration level." State v. Michael A. Janosky, No. M1999-02574-CCA-R3-CD, 2000 WL 1449367, at *4 (Tenn. Crim. App. at Nashville, September 29, 2000); see also State v. Harold W. Humphreys, No. M2001-00333-CCA-R3-CD, 2001 WL 844400, at *7 (Tenn. Crim. App. at Nashville, July 26, 2001). This court later explained that

> [the appellant's] argument that his submission to the test was involuntary . . . because he merely complied with the officer's demands is misplaced. . . . [V]oluntary consent is unnecessary as consent has already been obtained by the act of driving the motor vehicle upon the public roads of this state. There is nothing in the record establishing that the [a]ppellant was unable to refuse the test. Our law is clear that the only time "the test shall not be given" is when the motorist "refuses to submit" to the test.

Humphreys, No. M2001-00333-CCA-R3-CD, 2001 WL 844400, at *7; see also State v. Jonathan Aaron Baker, No. M2000-00320-CCA-R3-CD, 2001 WL 504917, at *5 (Tenn. Crim. App. at Nashville, April 30, 2001). Accordingly,

> the express consent of the motorist is not a prerequisite for the admission of a [blood] alcohol test into evidence in a DUI prosecution. Explicitly, . . . the voluntariness of the motorist's consent at the time of the testing is of no consequence because the motorist has impliedly consented as a matter of law when he or she elects to operate a motor vehicle upon the highways of this state. Rather, it is the motorist's express refusal, provided by legislature largesse, and not the voluntariness of the individual motorist's submission to the test . . . which governs the inadmissibility of the test results.

Janosky, No. M1999-02574-CCA-R3-CD, 2000 WL 1449367, at *6 (citations omitted).

It is undisputed that the appellant was driving upon a roadway of this State when he was stopped by Officer Hawtin. Suspecting that the appellant was intoxicated, Officer Hawtin asked the appellant to perform field sobriety tests, to which request the appellant responded that he did not know if he should. The appellant argues that his "refusal" to perform the field sobriety tests lends credence to his contention that he also refused the blood test. However, the video tape of the traffic stop clearly shows that the appellant never expressly refused to participate in the field sobriety tests. Instead, the appellant repeatedly delayed making a decision concerning whether he should take the field sobriety tests. After waiting some length of time for the appellant to decide, Officer Hawtin arrested the appellant for DUI.

Notably, at the suppression hearing the appellant only testified that he did not expressly consent to taking a blood alcohol test; he did not maintain that he had, at any time, expressly refused to take the blood test. Accordingly, "[t]here is no proof that the [a]ppellant refused to submit to the test." Humphreys, No. M2001-00333-CCA-R3-CD, 2001 WL 844400, at *7. Therefore, the results of the appellant's blood alcohol test were admissible at trial. This issue is without merit.

B. Motion to Compel

Next, the appellant argues that the trial court erred in failing to grant, under Tenn. R. Crim. P. 16, the appellant's motion to compel. Tenn. R. Crim. P. 16(a)(1) provides:

> (C) Documents and Tangible Objects. – Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.
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> (D) Reports of Examinations and Tests. – Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

The appellant requested that the trial court order the State to submit the following to the appellant:

> (1) Chain of custody documents;
> (2) Raw data from blood testing, including handwritten notes;
> (3) Line graphs and tabulated data printed by testing equipment;
> (4) Sample runs and associated calibration runs of testing equipment and compilations of same;
> (5) [TBI] standing operating procedure for blood alcohols and methods approved by [TBI] for such testing;
> (6) The techniques and methods promulgated by the [TBI] to ascertain the qualifications and competence of the individuals to conduct analysis, to operate and to maintain blood alcohol testing instruments; and

> (7) Any other document generated as a result of the testing of this blood sample.

During the motion to compel the production of the above requested items, the appellant's counsel summarily argued that he had made the same motion in two other cases, which motions were previously denied by the trial court. Counsel offered no information regarding how the requested items were material or how the information would benefit his case. At the conclusion of the brief motion to compel, the trial court denied the appellant access to all but the documents referenced under (7).

This court has recently addressed this exact issue. In State v. Zane Allen Davis, Jr., No. M2000-00737-CCA-R3-CD, 2000 WL 1879518, at *5 (Tenn. Crim. App. at Nashville, December 28, 2000), this court noted that

> [the appellant] failed to make an offer of proof regarding the materiality of the documents requested. After a thorough examination of the video tape record, we conclude that [appellant's] counsel has not provided us with any information which gives us a basis to rule in his favor. Not only is the record of the hearing on [appellant's] motion to compel and [appellant's] brief devoid of any proof establishing that the requested information was material, the trial record is deficient in this regard as well. Namely, we do not have before us any proof concerning what [appellant's] expert would specifically require in the way of pertinent facts nor what he would do with them if he had them. We similarly lack proof of what particular documents the TBI has in its possession that would be helpful and how the documents would assist [appellant's] case. Neither has [appellant] offered any proof such as incompetency concerning the TBI's lab personnel or historical proof of inaccuracies or unreliable results with respect to the lab's instruments or equipment. We further observe that counsel could have asked that the trial court perform an in camera examination of the requested documents. In sum, since the State did not present the information in issue as evidence during trial and [appellant] did not offer any proof as described above, we find no evidence that the requested documents were material. [Appellant] is not entitled to relief on this issue.

As the record before us is similarly devoid of specific proof in support of the appellant's request, we see no reason to deviate from this court's previous reasoning on this issue. This issue is also without merit.

C. Officer Hawtin's Testimony

The appellant also contends that the trial court erred in allowing the arresting officer to testify that he had released one hundred and fifty (150) people whom he had previously stopped for DUI. The appellant argues that this testimony should have been excluded as irrelevant. Tenn.

R. Evid. 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 402 explains that, once evidence is deemed relevant, it is admissible unless excluded by another rule of evidence, and "[e]vidence which is not relevant is not admissible." On appeal, "[t]he standard of review where the decision of the trial judge is based on the relevance of the proffered evidence under Rules 401 and 402 is abuse of discretion." State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997) (footnotes omitted).

In the course of explaining to the jury his experience with motorists who drive under the influence, Officer Hawtin testified that, in 1994, he ceased counting his DUI stops; nevertheless, the officer testified that he has arrested at least two hundred (200) individuals for DUI and has released approximately one hundred and fifty (150) others after determining that they were not under the influence. The appellant objected to the relevance of this testimony. Upon consideration of the issue, we conclude that this fact is relevant in assessing the officer's experience and ability to recognize motorists who are driving under the influence. Accordingly, as the evidence is relevant, the trial court properly admitted this testimony. However, even assuming arguendo that the officer's statement was irrelevant, the contested testimony is only one small part of the approximately one and one-half days of testimony. Even without this statement, "[t]he evidence of the defendant's guilt was sufficiently strong for us to conclude that the [statement] had no effect on the jury's verdict[]." State v. Johnny LaCurtis Phillips, No. 02C01-9307-CC-00160, 1994 WL 592050, at *10 (Tenn. Crim. App. at Jackson, October 26, 1994), aff'd by State v. Phillips, 924 S.W.2d 662 (Tenn. 1996). Therefore, any error is harmless. Tenn. R. Crim. P. 52(a). The appellant is not entitled to relief on this issue.

D. Lesser-Included Offense

The appellant argues that the trial court erred in not instructing the jury on the offense of driving while impaired (DWI), Tenn. Code Ann. § 55-10-418(a) (1998), as a lesser-included offense of driving under the influence (DUI), Tenn. Code Ann. § 55-10-401. The current test employed by this court to determine whether an offense is a lesser-included offense is enunciated in State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999). In examining the precise issue before us, this court has recently held "that the offense of adult driving while impaired is not a lesser-included offense of driving under the influence under the test pronounced in Burns." Humphreys, No. M2001-00333-CCA-R3-CD, 2001 WL 844400, at *9; see also State v. Robert G. Bean, No. M2000-02797-CCA-R3-CD, 2001 WL 1089760, at *6 (Tenn. Crim. App. at Nashvile, September 18, 2001); State v. Donald Lee Reid, No. M2000-02026-CCA-R3-CD, 2001 WL 1028815, at *5 (Tenn. Crim. App. at Nashville, September 7, 2001) (specifically finding that DWI is not a lesser-included offense of driving under the influence per se, Tenn. Code Ann. § 55-10-401(a)(2)). We are persuaded by these cases and are convinced that the trial court did not err in refusing to charge the jury on DWI as a lesser-included offense of DUI.

E. Jury Instructions

Finally, the appellant complains that the trial court's instruction on count one that an individual with a blood alcohol content of .10% or more may be presumed intoxicated under

Tenn. Code Ann. § 55-10-401(a)(1) and the instruction on count two that, pursuant to Tenn. Code Ann. § 55-10-401(a)(2), a blood alcohol content of .10% or more is an element of the offense of DUI was so unclear as to confuse or mislead the jury.

The trial court must give the jury "a complete charge on the law applicable to the facts of the case." State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). In the instant case, the appellant was charged in count one with violating Tenn. Code Ann. § 55-10-401(a)(1) which provides:

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
>
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system.
> . . .

Additionally, Tenn. Code Ann. § 55-10-408(a) (1998) explains that "evidence that there was, at the time alleged, ten-hundredths of one percent (.10%) or more by weight of alcohol in the defendant's blood shall create a presumption that the defendant's ability to drive was sufficiently impaired thereby to constitute a violation of § 55-10-401(a)(1)." The trial court instructed the jury, on count one, that "[e]vidence from the test that there was, at the time alleged, ten-hundredths of one percent (.10%) or more by weight of alcohol in the defendant's blood, creates an inference that the defendant was under the influence of such intoxicant, and that his ability to drive was impaired."[3]

On count two, the appellant was charged alternatively with violating Tenn. Code Ann. § 55-10-401(a)(2) which provides that it is illegal for a person to drive on the roads of this State while "[t]he alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more." The record reflects that the trial court clearly explained to the jury that, in order to find the appellant guilty of the offense charged in count two, the State must have proven that, as one of the essential elements of the offense, "the defendant had, at the time, an alcohol concentration in his blood of ten-hundredths of one percent (.10) or more." Accordingly, "because [a]ppellant was charged alternatively under both subsection 55-10-401(a)(1) and subsection 55-10-401(a)(2), the trial court was correct when it instructed the jury on both subsections." State v. Steven Overstreet, No. 03C01-9706-CC-00248, 1998 WL 865424, at *3 (Tenn. Crim. App. at Knoxville, December 15, 1998). We find nothing confusing about the trial court's explicit instructions. The appellant is not entitled to relief on this issue.

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[3] While the trial court should have also specified that the jury "may draw an inference of intoxication from the blood alcohol evidence *but that it is not required to do so*," State v. Robinson, 29 S.W.3d 476, 482 (Tenn. 2000) (emphasis added), it is clear that, because the jury acquitted the appellant of count one, the appellant was not prejudiced by this error. See State v. Ivory Thomas, No. 02C01-9705-CR-00179, 1998 WL 195953, at *1 (Tenn. Crim. App. at Jackson, April 24, 1998).

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE